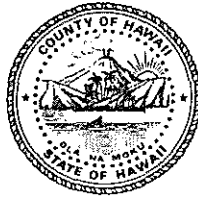


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Roy R. Takemoto  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7000 0600 0024 2905 2557

July 17, 2001

Mr. James B. Moore and  
Ms. Marie E. Moore  
P. O. Box 294  
Volcano, HI 96785

Dear Mr. Moore and Ms. Moore:

**VARIANCE PERMIT NO. 1219 (VAR 01-043)**

**Applicants: JAMES B. MOORE, ET AL.**

**Owners: JAMES B. MOORE, ET AL.**

**Request: Variance from Minimum Yards,  
Pursuant to Chapter 25, Zoning**

**Tax Map Key: 1-1-044:093, Lot 35**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1219 allows portions of that existing dwelling that were constructed within the affected rear yard to remain, "AS BUILT", pursuant to the applicant's April 24, 2001 site plan. The variance is to allow portions of the existing dwelling to remain with the minimum rear yard of between 18.32 feet from that respective rear boundary line in lieu of the minimum 20 feet rear yard as required by the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

006395

JUL 19 2001

## BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, containing 19,239 square feet, is Lot 35, Block A, Royal Hawaiian Estates, Keaau, Puna, Hawaii. The property is also commonly described as TMK: 1-1-044:093, Lot 35. The property is zoned Agricultural (A-1a) and is designated Agriculture "A" by the State Land Use Commission. The land area of the subject property is below the minimum land area requirement (1a: 43,560 square feet) for this zoned district and is therefore considered "non-conforming".
2. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 15, 2001.
3. **Site Plan.** The map or site plan drawing, drawn to scale, by Niels Chistensen, LPLS, and dated April 24, 2001, identifies the location of the existing dwelling, water tank, and other site improvements. The site plan denotes and identifies the building envelope using a series of "broken" or "dashed" line(s) prescribed by the Hawaii County Zoning Code. A portion of the dwelling's living area or "window seat" encroaches 1.68 feet into the property's 20 feet rear yard. The total encroachment equals approximately 10.5 square feet.  
  
The site plan drawing, dated April 24, 2001, also denotes and identifies the location of existing "rock walls", water tank, and other existing site improvements. It appears that portions of the existing "rock wall" encroach into an adjacent "lot". The rock wall encroachments shall be resolved by the applicants or between respective property owner(s).
4. **Building Permit(s).** A copy of the original building permit(s)-BP 951790 and BP 951791 and associated County approved detailed building construction plans to construct the dwelling, water tank, and other necessary site improvements in 1995 were not submitted with the applicant's variance application. (The site plan dated April 24, 2001 shall not be interpreted or construed to imply that all building improvements denoted and located on the site plan were constructed or permitted under building permits issued by the County).

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated May 11, 2001 states in part the following:

"TMK(s): (3) 1-1-044-093-0000-001"

"This is to certify that the real property taxes due to the County of Hawaii on the parcel(s) listed above have been paid up to and including June 30, 2001."

- b. The State Department of Health (DOH) memorandum dated June 4, 2001, in the subject variance file states in part:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems need to be maintained."

- c. The Department of Public Works (DPW) memorandum dated June 7, 2001, states in part:

"We have reviewed the subject application and have no comments to offer."

6. **Notice to Surrounding Owners.** Proof of mailing a first and second notice(s) were received by the Planning Department (Hilo Office) on May 22, 2001 and June 13, 2001, respectively. For the record, it appears that the first and second notice(s) were mailed from Hilo, HI 96720 on May 22, 2001 and June 13, 2001 respectively.

7. **Comments from Surrounding Property Owners or Public.** The Planning Department received a handwritten objection letter, dated June 8, 2001 from Ms. Marie Stumpf on June 12, 2001 and an undated handwritten letter from Ms. Ruth J. Tom endorsing "approve" the variance request on June 25, 2001.

Mr. James B. Moore and  
Ms. Marie E. Moore  
Page 4  
July 17, 2001

- 1) The June 8, 2001 handwritten letter from Ms. Stumpf states in part the following:

"I do not agree or approve for a request for zoning variance for TMK (3) 1-1-44:93 for James and Marie Moore (owners). <sic>

Too bad their window seat projects 1.36 feet into the rear bldg. <sic>  
That could have been avoided, by careful planning and adherence to the law/code.

I believe infringement on neighbor's property is wrong. Not just "oops, excuse me".

I do NOT approve of the variance."

- 2) The undated and handwritten letter by Ms. Tom and received on June 25, 2001 states in part:

"I approve of the above mentioned variance. I am the owner of property as follows:

Tax Key Number: 1-1-045-053-0000 001 COUNTY OF HAWAII

Tax Key Number: 1-1-045-054-0000 001 COUNTY OF HAWAII"

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

The subject TMK property's land area is below the minimum 1 acre or 43,560 square feet land area required for the A-1a zone and is therefore deemed "non-conforming".

In consideration of the applicant's submittals and findings above, a "window seat" jutting out from the rear wall of the existing dwelling built on the subject TMK property over 6 years ago encroaches into the subject TMK property's rear yard. Approximately 10.5 square feet of the dwelling was built within the subject TMK property rear yard. The bulk of the dwelling or remaining living area of dwelling, water tank, and attendant roof eaves meet minimum rear yard and open space.

Mr. James B. Moore and  
Ms. Marie E. Moore  
Page 5  
July 17, 2001

The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and "window seat" encroachments within that affected rear yard. The site plan identifies the distance between portions of the dwelling's enclosed window seat and attendant roof eaves from that affected rear boundary line. It appears that the "window seat" was inadvertently built approximately 1.68 feet into the property's rear yard in 1995. It appears the applicant or current owner(s) were unaware of any building encroachment issues or problem.

Therefore, considering the applicant's submittals, findings, and circumstances, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the applicants of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the current and best use of the subject property.

#### ALTERNATIVES

At this time there are no reasonable alternatives in resolving the difficulty of the applicant or current owner(s). Alternatives available to the current owner(s) or applicant to address and correct the existing building encroachments include the following actions:

1. Remove the "window seat" that encroaches into the affected rear yard.
2. Redesign and relocate the existing dwelling to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.

To require or impose removal of the dwelling's "window seat" encroachments and modifying the attendant roof eave(s) would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of these existing improvements may disrupt the dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character.

No evidence has been found to show indifference or premeditation by the applicants or current owner(s) to deliberately build or intentionally allow the building's "window seat" encroachment problems to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected rear yard. Furthermore, any non-permitted building improvements ("ROCK WALL" and perimeter wall improvements) denoted on the applicant's site plan submittal and built within the adjacent TMK property's will be removed and addressed between respective property owners.

Mr. James B. Moore and  
Ms. Marie E. Moore  
Page 6  
July 17, 2001

The Planning Department acknowledges there may be other design or building alternatives available to the applicants and owners beyond those cited above. However, these design and building alternatives are deemed to be unreasonable at this time and would place excessive demands on the applicants and current owners when a more reasonable alternative is available by the granting of the subject variance request.

Note: The existing perimeter rock walls or retaining walls within the property, less than six (6) feet in height, and identified on the applicant's site plan may not require any building permits from the DPW. However, the rock wall encroachments straddling a common side boundary line should be addressed between the applicants or respective owners. The subject variance request is limited to dwelling "window seat" encroachments within the rear yard which are identified on the applicant's site plan dated April 24, 2001 and does not include or address other wall/building encroachments or building permit issues.

#### INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision are to assure that adequate air circulation and exposure to light are available between permitted structure(s) and boundary/property lines. It appears that the existing dwelling and water tank were constructed under 2-valid building permit(s) issued to the owners by the County. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permit(s) did not disclose any encroachments into the affected yard or building irregularities. Both building permits were issued on November 22, 1995 and both building permits were closed by the DPW on December 9, 1996. The applicants and current owners are trying to resolve building encroachment problems that were disclosed after a modern survey or the existing property was performed and a map of existing conditions was prepared.

The circumstances to allow and permit the existing building and dwelling encroachments to be built and remain within that affected rear yard over 6 years ago are unique. Furthermore, the dwelling encroachments have been built within a side yard on property that is deemed non-conforming by the Hawaii County Zoning Code.

It appears that the "window seat" or the dwelling encroachments built into or within that affected rear yard in 1995 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 6 year old + dwelling encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the existing encroachment(s) within the affected rear yard was the builder's mistake which occurred in 1995 or a misinterpretation of the minimum building yards or boundary line(s) by the owners or builder. Inspection of the TMK property during the life of both building permits issued by the County and other agencies did not discover

Mr. James B. Moore and  
Ms. Marie E. Moore  
Page 7  
July 17, 2001

any dwelling encroachment problem or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling encroachments within that rear yard will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by certified letter dated May 23, 2001.

Based on the foregoing findings, this variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore, the variance request will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

#### VARIANCE DECISION AND CONDITIONS

The variance request is approved subject to the following conditions:


1. The applicant/owner(s), their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. Portions of the existing dwelling will not meet Chapter 25, the Zoning Code's, minimum side yard requirements. The approval of this variance allows the dwelling identified on the site plan submitted with the variance application, dated April 24, 2001 to remain on the subject TMK property
4. Future building improvements and permitted uses on the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
5. No ohana permit shall be granted to allow an ohana dwelling on the subject TMK property and no building permit(s) shall be issued to allow an ohana dwelling unit or second dwelling unit to be constructed or established on the subject TMK property.

Mr. James B. Moore and  
Ms. Marie E. Moore  
Page 8  
July 17, 2001

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



 CHRISTOPHER J. YUEN  
Planning Director

WRY:cps

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xc: Real Property Tax Office  
Ms. Marie Stumpf  
Ms. Ruth J. Tom